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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-616

METROPOLITAN HOUSING DEVELOPMENT CORPORATION, et al.,
Respondents,

vs.

THE VILLAGE OF ARLINGTON HEIGHTS, et al.,
Petitioners,

NORTHWEST OPPORTUNITY CENTER and ELUTERIA D. MALDONADO,
Intervening Respondents

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION OF THE AMERICAN SOCIETY OF PLANNING OFFICIALS FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

and

BRIEF OF THE AMERICAN SOCIETY OF PLANNING OFFICIALS AS *AMICUS CURIAE*

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COMES NOW THE AMERICAN SOCIETY OF PLANNING OFFICIALS by its undersigned attorney, and respectfully moves for leave to file the attached brief as *Amicus Curiae* in the above encaptioned case pursuant to Rule 42(3) of the Rules of the Supreme Court of the United States. In support of this application, it states:

1. The consent of the attorneys for the respondents has been obtained. The consent of the attorney for the petitioners was requested but refused.

2. The American Society of Planning Officials (ASPO) is a national membership association serving governmental planning agencies and local municipal officials. As such, it has studied the problems of planning and land use decision making for over four decades. ASPO provides technical assistance and does research on urban planning and local growth management systems. A very significant part of this area of concern and expertise pertains to the development of adequate housing opportunities for all citizens in this country. ASPO works to ensure that the comprehensive planning process encompasses rather than frustrates this concern with adequate housing opportunities.

3. This case presents a conflict between the strong tradition of local land use planning in this country and efforts to foster development of integrated and dispersed low income housing. It is the purpose of this brief by *Amicus* to show that local comprehensive planning, the rights of racial minorities, and the open housing laws of this country can function together. The opposition to desegrated housing opportunities is often shrouded in concerns for local decision making and the integrity of the comprehensive planning process. At the same time, advocates of dispersed housing opportunities for racial minorities and elimination of segregated housing patterns may denigrate the importance of local comprehensive planning. As one of the major urban planning spokesman in this country concerned with equal housing opportunities, ASPO is in an unique

position to proffer a balanced perspective of the issues presented by this case. The brief of *Amicus* will assist the court in fully understanding the context of the governmental decision making process in this case, and the rights of the various parties involved.

Respectfully submitted,

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BRIEF OF THE AMERICAN SOCIETY OF PLANNING OFFICIALS AS *AMICUS CURIAE*

INTEREST OF *AMICUS CURIAE*

This *Amicus Curiae* brief is respectfully submitted by the American Society of Planning Officials by leave of court pursuant to Rule 42(3) of the Supreme Court of the United States.

The American Society of Planning Officials (ASPO) is a national, nonprofit membership association devoted to the development and effective application of the best techniques for managing the development of cities, regions, states and the nation. ASPO brings together the professional

planner and citizen member of local boards and commissions from urban, suburban and rural areas; the elected official and community groups; the developer and development regulator; the practitioner, student and academician. Founded in 1934, ASPO presently has more than 13,000 members.

As a service organization ASPO facilitates communication among all groups in planning. It serves as the national clearing house for planning information and identifies and analyzes important trends in the planning field. Through contract research and membership service programs, ASPO provides the professional planner, government agency, and other interested persons with current information on planning and advice on emerging developments in the field.

ASPO believes that a comprehensive plan, formally prepared and adopted, is an essential tool of local self-governance. Making such a plan to guide the development of a community is a peculiarly local responsibility and prerogative. The standards to be set, the conflicts to be reconciled, the special character to be sought, the values to be preserved, the priorities to be pursued, the sacrifices to be made, the goals that justify them—all of these choices must be left to the free exercise of a community's discretion. When that discretion denies equal protection of the laws to racial minorities there should be a burden upon a community to defend that discretion.

SUMMARY OF THE ARGUMENT

Racial discrimination issues that are likely to come before the Court will not involve open discrimination that is unconstitutional on its face. Such

explicit acts, in the land-use field, have been definitively excluded by this court. *Buchanan v. Warley*, 245 U.S. 60 (1917).

The more difficult issues that now are brought to the court entail complex and interwoven motivations. The same act may be well-designed to achieve legitimate, necessary ends of the general welfare and yet have other effects that are injurious to racial minorities and deny equal protection of the laws.

In local decisions involving land-use, it is the *ad hoc* determination, with a rationale drafted to fit the circumstances of each case, that is likeliest to smuggle freight injurious to civil rights laws or to equal protection. Rejections of private efforts to alleviate segregated housing situations have had such injurious effects. The community's comprehensive plan is a vehicle available to prevent such smuggling if the plan is itself prepared with care, with due participation of citizens, set forth in explicit terms, and formally adopted.

In the process of judicial review, it is the presumption of validity of an ordinance that is likeliest to see a similar admixture of denials of civil rights or equal protection with rational and legitimate objectives. The compelling interest test provides the appropriate means to prevent abuse without improper substitution of the court's judgment for local legislative determinations.

A community may, in its comprehensive plan, establish that it has a rational basis for its ordinances not in conflict with constitutional or statutorily protected rights. The burden is on a complainant to prove otherwise. If, however, a complainant demonstrates that the clear effect of an ordinance is violative of constitutionally or statutorily protected civil rights, compelling interest

provides a rigorous test, protective of the interests of both parties, as a basis of review. A community's comprehensive plan, properly-drawn, will assist it in meeting the burden of demonstrating its compelling interests. Application of the compelling interest test should by no means result in an over-riding of all local regulation.

ARGUMENT

I.

THE FAILURE OF THE VILLAGE TO GRANT THE REZONING REQUESTED BY THE RESPONDENT MUST BE EXAMINED IN TERMS OF ITS EFFECT UPON RACIAL MINORITIES, NOT IN TERMS OF ITS PURPOSE OR INTENT

In examining challenges to governmental land use regulatory actions as racially discriminatory in violation of equal protection of the laws under the Fourteenth Amendment, the touchstone of judicial inquiry is effect, not motive. Most actions appear neutral on the surface and involve a complex of diverse motivations within the minds of each separate decision maker. Legislators and local officials have traditionally been free from juridic inquests plumbing their individual thought processes followed in reaching particular decisions, and courts have sought to avoid making such inquiries. *See City of Fairfield v. Superior Court of Salano County*, 14 Cal.3d 768, 537 P.2d 375 (1975).

This Court discussed the problems inherent in seeking out explicit racial motivation in its review of a municipality's decision to discontinue operation of several municipally owned or leased swimming pools in face of a desegregation order in *Palmer v.*

Thompson, 403 U.S. 217 (1971). After reviewing the prior decision of *United States v. O'Brien*, 391 U.S. 367 (1968), the Court observed:

> That opinion explained well the hazards of declaring a law unconstitutional because of the motivation of its sponsors. First, it is extremely difficult for the court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment. . . . It is difficult or impossible for any court to determine the "sole" or "dominant" motivation behind the choices of a group of legislators. Furthermore, there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed if for different reasons. (403 U.S. at 224-225.)

The Court emphasized that its prior equal protection analysis focused upon actual effect, not motivation. *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964), and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

Circuit courts addressing racial discrimination and the question of purpose or intent have also concluded that racial effect is the more workable standard. In one of the early equal protection challenges to a local redevelopment program, *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2nd Cir. 1968), the court stated:

> But the fact that the discrimination is not inherent in the administration of the program, but is, in the words of the District Court, "accidental to the

plan," surely does not excuse the planners from making sure that there is available relocation housing for all displaces. "Equal protection of the laws" means more than merely the absense of governmental action designed to discriminate; as Judge J. Skelly Wright has said, "we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." *Hobson v. Hansen,* 269 F.Supp. 401, 497 (D.D.C. 1967). (395 F.Supp. at 931.)

The complexity of the local land use control and planning process also makes concern with only motivation or intent in an equal protection challenge difficult. Many policies pursued by local governmental bodies are touted as in the best interest of the local community or argued to have been pursued in good faith. However, "[i]t is of no consolation to an individual denied the equal protection of the laws that it was done in good faith." *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 725 (1961). Municipal policies pursued in the name of otherwise established goals, however, often have an adverse effect upon racial minorities. Local property tax structures encourage zoning for what are felt, though often not supported in fact, to be low service-demanding, high tax ratables. This often results in antisocial consequences and misuse of the police power for only a privileged segment of society. Again, it is necessary to look to the effect of the local action on racial minorities, not simply the motivation.

Comprehensive planning is a process of determining the desired community character and goals carried on by the village in this case and most local

governments in this country. As a process, it entails the assessment of current conditions, resources and needs of the community, and an identification and choice of future goals. Given the disparate nature of communities, this is a highly open ended process that speaks in term of policies and objectives designed to guide subsequent decision making. Competing needs for scarce resources, housing, employment, and social services are addressed through this carefully thought out and reasoned endeavor.

Comprehensive planning is also a highly localized process with each community seeking to identify the factors which it desires to protect or perpetuate to ensure that those characteristics which make it a community are achieved or preserved. The goals and purposes of the community are ensured or obtained through various implementing techniques. This implementation of the comprehensive plan involves the public influencing or control of private activity, as well as certain public investments designed to accomplish the plan's goals. On the public fisc side, this may include investments in capital improvements such as highways and utility lines designed to encourage development of residential, commercial or industrial facilities. As to regulatory implementation, direct control of private activity through zoning restrictions remains the most common of all implementation techniques.

In this Court's opinion upholding zoning as a valid exercise of the police power, the well reasoned and comprehensive studies supporting that zoning were emphasized. *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 394 (1926). Local zoning based on a well reasoned and fair process must still meet, *inter alia,* constitutional requirements of due process

and equal protection. It is the requirement of equal protection and the extent of justification required for a local zoning decision that is at issue in this case.

While based on a fair and well reasoned process, zoning is a continually changing activity. A landowner desiring to develop a specific parcel of property must often seek development permission individually tailored to that property and the specific development proposal. Permission to develop may entail request for a specific rezoning of the property in question to the proper use classification or density limitation, or a special use permit may be necessary. A project must also often receive site plan review approval as to the design of the development, and ultimately, a building permit and utility hook-up permission. All of these stages of permission entail negotiation and exercise of discretion by the governmental body involved. They remain subject, however, to constitutional requirements of due process and equal protection. Particular property or classes of people may not be discriminated against, procedures must be open and fair, and restrictions must not arbitrarily deny all development value of a parcel of land.

Because of this complex nature of the local land use decision making process, decisions claimed to have a racially discriminatory effect arise in many contexts. The decision challenged may involve an attempt to rezone a parcel of property so as to keep out a project designed for low income and minority residents, or refusal of an application for necessary zoning to allow development of such a project. In *Dailey v. City of Lawton,* 425 F.2d 1037 (10th Cir. 1970), for example, a private nonprofit housing developer challenged the municipal refusal to rezone a parcel of land for multiple-family dwellings on the

ground of racial discrimination. The court found that the refusal to rezone was racially discriminatory and unlawful, without a showing of "racial intent" on the part of the public officials. Similarly, in *Sisters of Providence of St. Mary of the Woods v. City of Evanston,* 335 F.Supp. 396 (N.D. Ill. 1971), the court refused to dismiss a challenge to the city's refusal to rezone a parcel of property to a higher density. The court observed that the city could not "refuse to rezone for black projects where under the same circumstances it would have granted a variance to an all-white project." (335 F.Supp. at 404.)

Many other devices of local land use regulation may, as applied, effectuate a discriminatory and segregated housing pattern. These include, in addition to zoning, refusals of building permits, connections to public water systems, and connections to sewer systems. In *Kennedy Park Homes Association v. City of Lackawanna,* 436 F.2d 108 (2nd Cir. 1970), and *Crow v. Brown,* 457 F.2d 788 (5th Cir. 1972), refusals of necessary permits were found to be invalid because of racially discriminatory effect. And again, more recently, in *United Farm Workers of Florida Housing Project, Inc. v. City of Del Ray Beach,* 493 F.2d 799 (5th Cir. 1974), refusal of water and sewer permits was found to have a racially discriminatory effect, particularly in light of evidence that other developments had been extended services. The effect of the city's action was to reinforce the existing segregated housing pattern in the city and to frustrate efforts to construct housing that would be inhabited by a large proportion of low-income minority families. The circuit court held:

> Once the existence of a racially discriminatory effect is thus proven, the City must bear the heavy burden of demonstrating that its refusal

and resulting discrimination, were necessary to promote a compelling governmental interest. (493 F.2d at 809.)

The entire panoply of public services provided by municipal governments has also been challenged on the basis of racial discrimination. In *Hawkins v. Town of Shaw,* 461 F.2d 1171 (5th Cir. *en banc* 1972), the court examined the challenge to the town's allegedly discriminatory policies of providing public services in terms of racial effect. The *en banc* court reaffirmed the decision of the original panel of the court, 437 F.2d 1286 (5th Cir. 1971), to the effect that a denial of equal protection of the laws had been established.

II.

A REZONING DENIAL WHICH SERVES TO PERPETUATE A RACIALLY SEGREGATED HOUSING PATTERN IN FACE OF PRIVATE EFFORTS TO ALLEVIATE THAT PATTERN HAS A RACIALLY DISCRIMINATORY EFFECT UNDER EQUAL PROTECTION OF THE LAWS OF THE FOURTEENTH AMENDMENT

Adverse racial effect is established where a housing project, which would provide housing for a larger than usual minority population, is rejected by a community that is highly segregated. Under the Equal Protection Clause of the Fourteenth Amendment the burden then shifts to the municipality to justify its actions by some compelling governmental purpose. This Court's opinion in *Palmer v. Thompson,* 403 U.S. 217 (1971), does not hold to the contrary as some decisions have interpreted it. In a

case similar to the one at bar, the Sixth Circuit cited *Palmer* for the proposition that a neutral policy with greater impact on a minority group is not invalid. *Skilken & Co. v. Toledo,* Nos. 74-2116 and 74-2320 (6th Cir. filed December 10, 1975). *Accord Mahaley v. Cuyahoga Metropolitan Housing Authority,* 500 F.2d 1087, 1093 (6th Cir. 1974). This is not what this Court stated in *Palmer.* It simply held that there was no evidence in that case to show that the city had affected blacks differently from anyone else in closing down its municipal swimming pools. The Court reiterated that it will continue to look to racial effect in equal protection challenges. *See* Kushner & Werner, *Metropolitan Desegregation After* Milliken v. Bradley: *The Case For Land Use Litigation Strategies,* 24 **Catholic Univ. L. Rev.** 187, 212 (1975).

This analysis is similar to that carried on under other laws prohibiting activities that discriminate against racial minorities. In the area of employment, this Court has invalidated even private practices that, while racially neutral on the surface, disproportionately affect minorities. In *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971) it was stated that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds' for minority groups and are unrelated to measuring job capability." (401 U.S. at 432). See *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); *Gaston County v. U.S.,* 395 U.S. 285 (1969) (voting restrictions); *U.S. v. Real Estate Development Corp.,* 347 F.Supp. 766 (N.D. Miss. 1972) (public housing); and *Keyes v. School District No. 1, Denver, Colorado,* 413 U.S. 189, 217 (1973) (public schools) (Powell, J., concurring in part, dissenting in part).

In the case at bar, the private developer had sought

a change in zoning to permit development of a planned multi-family residential project. This project would have been occupied by a large percentage of minority familiies and would have appreciably reduced racial segregation in the community. However, the village refused to grant the necessary rezoning, thereby preventing significant integration of the community which would have obtained through the respondents' private housing development. This represents state action significantly and adversely affecting racial minorities. The village's decision so affects the private market that the segregated character of the community would continue intact. The only workable measure of the community's action is effect. There is no meaningful way to distinguish *de facto* as opposed to *de jure* action within the confines of equal protection of the laws. *Keyes v. School District No. 1, Denver, Colorado,* 413 U.S. 189, 217 (1973) (Powell, J., concurring in part and dissenting in part). This also gives an official imprimature to the existing housing segregation. For state or community action to so affect private housing specifically designed to help alleviate a segregated condition, its reasons must be compelling or its actions will be held invalid under the Equal Protection Clause of the Fourteenth Amendment.

This does not mean that the village has an affirmative obligation to provide housing for anyone, or to solve the racial segregation problems of the entire Chicago metropolitan region. The respondents seek only to build a private housing project without imposing any burdens upon the village. The Second Circuit has noted the difference between imposing burdens and removing barriers in several cases involving subsidized housing projects. That court

has refused to impose an affirmative duty upon a local government to construct housing or to affirmatively seek out subsidized housing. *Acevedo v. Nassau County,* 500 F.2d 1078 (2nd Cir. 1974), and *Citizens Committee for Faraday Wood v. Lindsay,* 507 F.2d 1065 (2nd Cir. 1974). However, the court also reaffirmed its holding in *Kennedy Park Homes Association v. City of Lackawanna,* 436 F.2d 108 (2nd Cir. 1970), that governmental barriers to private efforts to provide integrated housing in a highly segregated market would be closely scrutinized. Speaking of the *Lackawanna* case, the Second Circuit held in *Faraday Wood:*

> Against this background [a clearly segregated city] we held that the city could not, absent a compelling interest, thwart the efforts of a private organization to build housing for low-income families in the white area of the city by, among other things, refusing to accede to a reasonable rezoning request. (507 F.2d at 1069.)

This element of imposing additional financial burdens upon a community absent a duty to provide housing or other services has also been noted in the opinions of this Court. *James v. Valtierra,* 402 U.S. 137 (1971) and *Palmer v. Thompson,* 403 U.S. 217 (1971). This factor further distinguishes those decisions from the case at bar. The respondents herein make no such demand of the village. In fact, there was evidence that their development would make a net contribution to the public fisc.

The Village of Arlington Heights is clearly a segregated community. Furthermore, it lies within a larger area that has also been found to be segregated. *Clark v. Universal Builders,* 501 F.2d 324 (7th Cir. 1974). The circuit court in the case at bar found that out of

the village's 64,884 residents in 1970, only twenty-seven were black. The respondents' development would significantly alleviate the segregated housing situation. To deny them the right to go ahead with their project in light of the segregated character of the community has discriminatory racial effects. The denial of the rezoning for this project must be strictly scrutinized and justified by some compelling governmental interest. To do less would be a violation of equal protection of the laws as to the respondents herein.

III.

A REZONING DENIAL WHICH SERVES TO PERPETUATE A RACIALLY SEGREGATED HOUSING PATTERN IN FACE OF PRIVATE EFFORTS TO ALLEVIATE THAT PATTERN HAS A RACIALLY DISCRIMINATORY EFFECT UNDER THE 1866 CIVIL RIGHTS ACT AND THE 1968 FAIR HOUSING ACT

Fair and open housing is clearly the law and policy of the United States. This policy is effectuated, *inter alia*, by the 1866 Civil Rights Act, 42 U.S.C. § 1982 and the 1968 Fair Housing Act, 42 U.S.C. §§ 3601 *et. seq.* As with challenges under the Equal Protection Clause of the Fourteenth Amendment, the determination of violation of these acts is concerned with effect and not intent. The Fair Housing Act is aimed at "all practices which have a racially discouraging effect." *Zuch v. Hussey*, 366 F.Supp. 553 (E.D. Mich. 1973). This court has given a broad interpretation to the Civil Rights Acts also. See *Jones v. Alfred H. Meyer Co.*, 392 U.S. 409 (1968) and *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972).

Denial of development permission for a project which would alleviate existing racial segregation has

a racially discriminatory effect in violation of the fair housing laws and civil rights acts. Activities subject to review under these laws must be justified by a compelling governmental interest or they will be invalidated. *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974); *Kennedy Park Homes Association v. City of Lackawanna*, 436 F.2d 108 (2nd Cir. 1970).

IV.

LOCAL ZONING ACTION WHICH HAS DISCRIMINATORY RACIAL EFFECTS UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, THE 1866 CIVIL RIGHTS ACT, OR THE 1968 FAIR HOUSING ACT MUST BE JUSTIFIED BY SOME COMPELLING GOVERNMENTAL INTEREST

Action which has the effect of discriminating on the basis of race is subject to strict scrutiny and must be supported by a compelling governmental interest, or it is invalid under the Equal Protection Clause of the Fourteenth Amendment or fair housing and civil rights laws. *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Shapiro v. Thompson*, 394 U.S. 618 (1969). The village's denial of the rezoning request, when it has this effect, removes the presumption of validity of its action. The burden is then upon the village to establish the compelling interest sought to be protected by refusing that request. *Dunn v. Blumstein*, 405 U.S. 330 (1972); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974).

In *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), the court enjoined enforcement of an ordinance preventing construction of apartments because of the ordinance's discriminatory

effects. The court held:

> Once the plaintiff has established a prima facie case by demonstrating racially discriminatory effect, the burden shifts to the governmental defendant to demonstrate that its conduct was necessary to promote a compelling governmental interest. (508 F.2d at 1185.)

The court observed that the compelling interest test would be properly applied whether the challenge was based upon the Fourteenth Amendment or upon the federal fair housing laws. (508 F.2d at 1185, n. 4.) The court continued:

> In determining whether any of these [asserted interests] rise to the level of a compelling governmental interest, we must examine: first, whether the ordinance in fact furthers the governmental interest asserted; second, whether the public interest served by the ordinance is constitutionally permissible and is substantial enough to outweigh the private detriment caused by it; and third, whether less drastic means are available whereby the stated governmental interests may be attained. (508 F.2d at 1187.)

The *Black Jack* court went on to find that the city's claimed interests in traffic control, overcrowded schools, and adjacent property values failed to meet even the first element of the compelling interest test. Concerning alleged devaluation of adjoining single-family homes, the court indicated that a metropolitan area planning study of apartment developments had concluded that such developments did not adversely affect single-family property values.

The justifications argued to be compelling in the case at bar were maintaining the integrity of the

zoning plan's buffer policy and protecting neighboring property values. The circuit court concluded that neither of these interests were sufficiently compelling to justify the racially discriminatory effect of the village's denial of the rezoning request.

V.

THE INTERESTS PUT FORTH BY THE VILLAGE HEREIN WERE NOT SUFFICIENTLY COMPELLING TO JUSTIFY THE DENIAL OF THE REZONING TO THE RESPONDENTS

The village argues that the rezoning request was denied in order to protect the integrity of the zoning plan and the community's master plan. It argues that property owners in the area had and continue to rely upon the single-family nature of zoning in the area, and the policy that multiple dwellings would only be used as buffers to more intensive uses. *Amicus* suggest that, however viewed, these reasons do not satisfy the compelling interest requirement.

Property owners in the village have no right to expect that zoning will continue unchanged forever as to any particular parcel of property. This is particularly true where the land is previously undeveloped as the property involved here was. Low density single-family residential zoning is often used as a holding zone until a landowner's plans become more definite. Zoning is not a static process, and change is a natural and expected part of the system. As one court had occasion to observe after reviewing a number of zoning cases:

> An examination of the multitude of zoning cases that have reached this court leads us to the con-

> clusion that the common practice of zoning agencies, after the adoption of an original ordinance, is simply to wait until some property owner finds an opportunity to acquire a financial advantage by devoting his property to a use other than that for which it is zoned, and then struggle with the question of whether some excuse can be found for complying with his request for a rezoning. (*Fritts v. City of Ashland,* 348 S.W.2d 712, 714 (Ky. 1961).)

The integrity of a system which is based on continual change and refinement does not require denial of every change. As the court quoted above went on to say, "planning" not excuses is the foundation for zoning. The necessity of a well reasoned and thought out plan as the basis of comprehensive zoning was one of the pole stars of this Court's decision to uphold police power zoning in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926).

Comprehensive zoning is traditionally given a presumption of validity which must be overcome in most cases by the challenger. Petitioners in the case at bar point this out and emphasize the refusal by the judiciary to substitute its judgment for that of a zoning body or to sit as super zoning boards. Though some distinction may be made as to piecemeal changes in zoning, *Amicus* agrees that for the most part petitioners have set out a proper picture of the *usual* zoning review situation. However, this is not an usual zoning case. The element of racial effect in the village's rejection of respondents' rezoning request removes this case from that category. This case must be subjected to strict scrutiny by the Court to ensure that the reasons behind the village's action are legitimate and compelling, and determine if there are less drastic means of achieving these ends.

The village asserted that its policy of using multi-family developments as buffers to more intensive uses was part of the planning basis of its rejection of this zoning application. However, there was evidence that the buffer plan had not been applied consistently. While the court found that there had been no purposeful discrimination in the application of the buffer policy, the questionable consistency weakened the policy as a compelling interest to be protected. If compelling, why not in every instance? Furthermore, there was evidence showing that the nature of the project proposed herein was not a high density or large apartment building as encompassed within the meaning of the buffer policy. The townhouse development proposed in this case was more in character with the single-family dwellings in the area than a typical apartment complex or highrise contemplated by the requested zoning district and the buffer policy. Two dissenting members of the plan commission had pointed out that in terms of density, architecture, and most other characteristics, the clusters of two-story townhouses were more in keeping with the single-family zoning district than the multiple-family zone.

However artificial the zones or districts may have been, the respondents' development came only within the definition of multiple-family dwellings as permitted in the requested R-5 zone. In order to build their project, the respondents had to obtain the appropriate classification. Lines drawn to distinguish types of residential dwelling must admittedly be put somewhere. But the distinctions between the residences contemplated by this project and adjacent residences here are not compelling.

The buffer policy fails to meet the first element of the compelling interest test, that it "in fact furthers the governmental interest asserted." The townhouse

project proposed in the case at bar was not of the typical apartment nature sought to be used as a buffer, and had more in common with the adjacent single-family dwellings. This proposal would not so seriously disrupt the character of the area as to destroy the integrity of the comprehensive zoning plan for the area. With a development proposal so similar to the adjacent single-family development, there were certainly other less drastic means to ensure that any alleged adverse impact on the adjacent single-family area might be lessened. Proper design assurances, layout and clustering of the townhouses, and creative arrangement of open space areas and access facilities have all been useful in this regard. As the development was proposed here, more than sixty per cent of the site would be maintained as open space.

The second interest put forth by the village as compelling was that neighboring property values might be diminished. Though the circuit court questioned whether such considerations would ever be a compelling interest, it held that the facts in this case could not support such an interest even if compelling. While a dramatic or total destruction in property values might be a compelling interest, certainly only a speculative five or ten per cent decrease at most, as suggested by the village's own expert, is not. Furthermore, the protection of property values due to reliance on the existing zoning is not compelling where the property owners could not expect the undeveloped land to stay the same forever, and had no right to see the land used only in a manner exactly like theirs. The property in question had been maintained as open space by a private institution no longer wishing to do so. Also, the nature of the development proposed here is so similar to the single-family dwellings already in

existence that adverse impact is difficult to perceive. The design and layout of the project can ensure that any adverse impact that might allegedly occur will be minimized.

To the extent the fear of decreased property values is due to antagonism towards the development because of its potential racially integrated character, this simply cannot create a property value to be protected. To hold otherwise would be to say that first, a racially segregated, all-white residential community was more desirable and could justifiably command a premium price for residency therein. And second, it would mean that this "premium" was a right justifying racial discrimination and perpetuation of segregated housing.

The petitioners' suggest in their brief that application of the compelling interest test to local land use decisions involving applications to build low-income multiple-family dwellings will result in the destruction of all single-family zoning districts. (Petitioners' Brief at 16.) This logic simply is unfounded and will not result from the Court's affirmance of the circuit court opinion in this case. Comprehensive community planning and local land use regulations designed to establish distinct residential districts may still be established and defended. The Sixth Circuit has spoken to the issue of whether application of the compelling interest test would destroy all local zoning. *Skilken & Co. v. Toledo,* Nos. 74-2116 and 74-2320 (6th Cir. filed December 10, 1975). To the extent this decision concludes that application of the compelling interest means destruction of local zoning, *Amicus* suggests it is incorrect. However, such a position is not entirely clear from the opinion. The court notes that the city could have satisfied the compelling interest test if necessary. (Slip opinion at 20, n. 4.) Furthermore, much of the court's concern

with the future vitality of local zoning controls was due to its dissatisfaction with the remedy fashioned by the district court—preparation of a disegregation plan by the city. A remedy the court felt was unwarranted and beyond the power of the judiciary.

The case at bar is concerned with racial discrimination and private efforts to alleviate the problems of segregated housing patterns. Communities are not being asked to provide housing for anyone or to discard all existing regulations in deference to low-income integrated housing. A proposal to build upon a flood plain, in an area with unstable soil conditions, or where public facilities such as sewer and water were not yet available could be validly rejected under the compelling interest test. Many other conditions may also, in specific instances, meet the burdens of this test. But these concerns or interests must be supported by the evidence and not used to discriminate against racial minorities. See, *e.g., United Farm Workers of Florida Housing Project, Inc. v. City of Delray Beach,* 493 F.2d 799 (5th Cir. 1974); *Church of God of Louisiana v. Monroe-Ouachita Regional Planning Commission,* 404 F.Supp. 175 (W.D. La. 1975).

A development proposal that is in clear contradiction to an established and consistently followed policy of a community's comprehensive plan and land use restrictions may yet be rejected. Where policies are explicit and the grounds for application and non-application are set out, the compelling interests sought to be protected may be upheld. Communities that have become highly segregated must ensure that their decisions which reject private efforts to introduce integrated housing developments do not simply effectuate a continuation of that segregated pattern.

CONCLUSION

The use of zoning in this country was established on the legitimate desire of communities to determine future development for themselves as against the right of individuals to use private property without restrictions.

This Court approved local zoning controls in *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926). Two years later the Court again had occasion to scrutinize zoning powers and pull in the reins of a specific exercise of the "governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use." *Nectow v. City of Cambridge,* 277 U.S. 183, 188 (1928). This opinion indicated a willingness to supervise exercise of zoning powers as necessary to protect private rights.

This Court had the scope of power of local zoning authorities before it again quite recently in *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974) where it reaffirmed the expansive power of local zoning controls. However, the Court also evidenced a willingness to more closely scrutinize zoning actions that infringe upon fundamental rights or discriminate against racial minorities. It found no evidence in the record to indicate infringement of constitutionally protected rights by that community's definition of "family." This case presents the opportunity for the Court to examine modern zoning practices that infringe upon the rights of racial minorities seeking open housing opportunties offered by a private developer in an otherwise segregated housing market. Just as *Nectow* complimented and clarified the Court's original approval of zoning, so this case will present a clarification to *Belle Terre* in the application of the compelling interest test to

activities infringing on constitutionally protected rights.

The invocation of the compelling interest test and its application must be done with rigor to avoid displacing local legislative judgments with judicial judgments. For the community, its strongest evidence in meeting this burden of demonstrating a compelling interest remains it comprehensive plan, adopting policies for all to read and follow. Just as planning and forethought were important to this Court's original decision to uphold zoning, so the modern comprehensive planning process retains validity in meeting additional burdens when constitutionally protected rights are at stake. Courts need not impose any uniformity of standards or values on communities as long as constitutionally or statutorily protected rights are guarded. Within this context, communities remain free to lay out areas where the "blessings of quiet seclusion, and clean air make the area a sanctuary for people." *Village of Belle Terre v. Boraas,* 416 U.S. 1, 9 (1974).

Amicus respectfully submits that the decision of the U.S. Court of Appeals for the Seventh Circuit is correct, and, accordingly, should be affirmed.

Respectfully submitted,

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